

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

GUS RUSSO
221 Blakeney Rd
Baltimore, Maryland 21228
(Baltimore County)

Plaintiff,

v.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES
200 Independence Avenue, S.W.
Washington, D.C. 20201

and

CENTERS FOR MEDICARE AND
MEDICAID SERVICES
Room N2-20-16
7500 Security Boulevard
Baltimore, Maryland 212-44-1850
(Baltimore County)

and

AGENCY FOR HEALTHCARE
RESEARCH AND QUALITY
540 Gaither Road, Room 2222
Rockville, Maryland 20850
(Montgomery County)

and

EXECUTIVE OFFICE FOR UNITED
STATES ATTORNEYS
U.S. Department of Justice
Room 7300, 600 E Street, N.W.
Washington, D.C. 20530-0001

and

Civil Action No. 04-_____

OFFICE OF MANAGEMENT AND)
BUDGET)
727 17th Street, N.W.)
Washington, D.C. 20503)
)
Defendants.)
_____)

COMPLAINT

This is an action brought pursuant to the Freedom of Information Act, 5 U.S.C. § 552 et seq. (“FOIA”), for injunctive and other appropriate relief, seeking the disclosure and release of agency records improperly withheld from plaintiff Gus Russo by defendant Department of Health and Human Services (“HHS”) and its component entities Centers for Medicare and Medicaid Services (“CMS”) and Agency for Healthcare Research and Quality (“AHRQ”), defendant Executive Office for United States Attorneys (“EOUSA”), and defendant Office of Management and Budget (“OMB”).

JURISDICTION

1. This court has both subject matter jurisdiction and personal jurisdiction over the defendants pursuant to 5 U.S.C. §§ 552 (a)(6)(E)(iii), (a)(4)(B), and 28 U.S.C. § 1331.

VENUE

2. Venue is appropriate under 5 U.S.C. §§ 552 (a)(6)(E)(iii), (a)(4)(B), and 28 U.S.C. § 1391.

PARTIES

3. Plaintiff Gus Russo (“Russo”) is a United States citizen, and a veteran investigative reporter and author of several books.

4. Defendant HHS is a Department of the Executive Branch of the United States Government and includes its component entities CMS and AHRQ. HHS, CMS and AHRQ are agencies within the meaning of 5 U.S.C. § 552(f)(1).

5. Defendant Executive Office for United States Attorneys (“EOUSA”) is an agency of the United States Department of Justice (“DOJ”), and, among other things, is responsible for organizing responses to FOIA requests made to the offices of U.S. Attorneys. EOUSA is an agency within the meaning of 5 U.S.C. § 552(f)(1).

6. Defendant Office of Management and Budget (“OMB”) is, among other things, responsible for overseeing the preparation and implementation of the federal budget. Although an office of the President of the United States, OMB is nevertheless considered an agency within the meaning of 5 U.S.C. § 552(f)(1).

FACTUAL BACKGROUND

7. In 2002, CMS and AHRQ were developing a survey designed to help evaluate hospital performance by comparing patient experiences.

8. On July 11, 2002, Robert L. Nielsen (“Nielsen”), the managing partner of the Gallup Organization (“Gallup”), wrote Thomas A. Scully (“Scully”), then CMS Administrator, to request a meeting to discuss the concerns Gallup and other survey companies had regarding the perception that the National Research Corporation (“NRC/Picker”) had an inside track on an award, which was estimated to be worth between \$15 and \$20 million, to administer the hospital surveys. Scully apparently never responded to the letter from Nielsen.

9. The following week, Scully, via video, addressed a symposium that NRC/Picker held for its clients. No other survey firms attended the symposium.

10. In August 2002, Nielsen raised his concerns about the contracting process with a Scully aide. A follow-up meeting was held in September between Nielsen and various officials. Specifically, Nielsen

raised concerns about the number of former NRC/Picker employees at CMS and was told none would be involved in the selection.

11. Nielsen, however, learned that two of the six selection committee members were former NRC/Picker employees. Although they were taken off the selection committee, a few weeks later other events occurred that caused numerous companies to continue to hold concerns about the award process. Finally, Nielsen sent a March 5, 2003, e-mail to Brenda Aquilar, an official at the OMB, requesting a funding freeze for a pilot survey until CMS's actions could be reviewed.

12. Scully responded to Nielsen's e-mail that same day calling him an "idiot," "jerk" and "weasel" for trying to get the new survey's financing stopped until an investigation was conducted. Scully also threatened to stop speaking with Aquilar if she met with Nielsen on the matter. He wrote: "Brenda, if you meet with this guy it will be the last time I ever speak to you about CMS issues. I would like to investigate this idiot - I'm the most open person in Washington and this JERK has never called me."

13. The process involved in the developments of the survey and the granting of the contract award, as well as Scully's e-mail, led to Congressional inquiries and calls for investigations. Representative Billy Tauzin, chairman of the House Energy and Commerce Committee, wrote to Scully asking about the allegations that he favored NRC/Picker. Congressman Tauzin noted that questions had been raised about whether proper contracting requirements were followed and whether "development of a survey instrument was tainted by the involvement of government employees with conflicts of interest." Additionally, Representative Lee Terry wrote OMB Director Mitch Daniels and asked that financing for the pilot survey be halted until the matter was resolved. Congressman Terry also sought to have the House Energy and Commerce Committee conduct investigative hearings on the matter.

14. On April 8, 2003, Gallup filed a lawsuit against Scully in the United States District Court for the District of Columbia charging him with violations of federal law and regulations (The Gallup Organization et al. v. Thomas A. Scully et al., Civil Action No. 03-0849 (D.C.C.)(CKK)).

15. This specific controversy has been reported extensively by the media including, but not limited to, the *Associated Press*, *Congressional Quarterly Daily Monitor*, the *Federal Times*, the *Hill*, *Homecare*, *Modern Healthcare*, the *National Journal*, the *Omaha World Herald*, *Roll Call*, and the *Washington Post*.

16. Additionally, the NRC/Picker matter is just one of several occasions where Scully's actions were controversial, if not unethical or perhaps even illegal. For example, the GAO recently investigated alleged threats made by Scully to terminate the CMS Chief Actuary if he provided various cost estimates to members of Congress. On September 7, 2004, the GAO issued its report and concluded that Scully had indeed threatened to sanction his employee if he communicated with Congress. In its report, GAO noted that Scully should forfeit the salary he received during the period in question, which to date he has not agreed to do.

PLAINTIFF'S FOIA REQUEST

17. By letter dated September 17, 2004, Russo submitted a FOIA request to each of the defendants seeking records (1) related to the process surrounding and any decisions regarding, the development of the hospital surveys; (2) to or from NRC/Picker and/or any of its employees to the various defendant agencies regarding the information sought in (1); (3) related to the March 5, 2003 email from Scully to Nielsen; (4) related to the lawsuit filed by Gallup against Scully in April of 2003; and (5) related to any investigation into the conduct of Scully while Administrator of CMS.

18. The request also sought a full fee waiver and expedited processing.

COUNT ONE-HHS, CMS and AHRQ

19. Russo adopts and incorporates the information contained in paragraphs 7-18.

20. By letter dated September 23, 2004, HHS, on behalf of itself and its component agencies, CMS and AHRQ, granted expedited processing.

21. By letter dated October 13, 2004, HHS released approximately 104 pages in full which were located by the Office of the Executive Secretariat, Office of the Secretary. No other records have been released by HHS, CMS or AHRQ, notwithstanding FOIA's requirement that a response is required within twenty (20) working days (which does not take into account the fact that expedited processing was granted).

22. HHS, CMS and AHRQ, therefore, have failed to comply with the requisite statutory and regulatory periods that govern compliance with FOIA requests.

23. Russo has exhausted any necessary administrative remedies.

24. HHS, CMS and AHRQ have wrongfully withheld the requested records from Russo.

COUNT TWO-EOUSA

25. Russo adopts and incorporates the information contained in paragraphs 7-18.

26. By letter dated September 28, 2004, EOUSA granted expedited processing.

27. To date, EOUSA has not provided the records requested by Russo in his FOIA request, notwithstanding FOIA's requirement that a response is required within twenty (20) working days (which does not take into account the fact that expedited processing was granted).

28. EOUSA, therefore, has failed to comply with the requisite statutory and regulatory periods that govern compliance with FOIA requests.

29. Russo has exhausted any necessary administrative remedies.

30. EOUSA has wrongfully withheld the requested records from Russo.

COUNT THREE-OMB

31. Russo adopts and incorporates the information contained in paragraphs 7-18.

32. To date, OMB has not responded to Russo's request for release of records, a fee waiver or expedited processing.

33. OMB, therefore, has failed to comply with the requisite statutory and regulatory periods that govern compliance with FOIA requests.

34. Russo has exhausted any necessary administrative remedies.

35. OMB has wrongfully withheld the requested records from Russo.

PRAYER FOR RELIEF

WHEREFORE, plaintiff Gus Russo prays that this Court:

(A) order defendants to disclose the requested records in their entireties and make copies available to him within the period of time established by the Court;

(B) order the defendants to grant the requested fee waiver;

(C) order OMB to grant Russo's request for expedited processing;

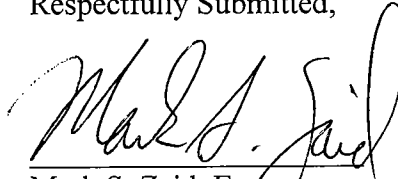
(D) provide for expeditious proceedings in this action pursuant to 28 U.S.C. § 1657(a);

(E) award plaintiff his costs and reasonable attorney's fees incurred in this action; and

(F) grant such other relief as this court may deem just and proper.

Date: October 21, 2004

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Mark S. Zaid". The signature is fluid and cursive, with the first name "Mark" and last name "Zaid" being clearly legible.

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